

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PATRICIA DESANTIS, et al.

Plaintiffs,

No. C 07-03386 JSW

v.

CITY OF SANTA ROSA, et al.,

Defendants.

**ORDER DENYING PLAINTIFF'S
PETITION TO CERTIFY APPEAL
AS FRIVOLOUS**

Now before the Court is Plaintiffs' petition to certify Defendants' appeal as frivolous. The Court finds that this matter is appropriate for disposition without oral argument and it is hereby deemed submitted. *See* Civ. L.R. 7-1(b). Accordingly, the hearing set for January 9, 2009 is HEREBY VACATED. Having carefully reviewed the parties' papers, considered their arguments and the relevant legal authority, the Court hereby denies Plaintiff's petition.

The Court may certify an appeal of a claim of qualified immunity if the appeal "is so baseless that it does not invoke appellate jurisdiction." *Marks v. Clarke*, 102 F.3d 1012, 1017 n.8 (9th Cir. 1996).

Defendants argue that the Court's order was not based on a finding that there were disputed issues of fact. Defendants have misconstrued the Court's order. The Court found the following material facts were disputed: the speed Mr. DeSantis was traveling towards the officers, whether the officers were informed and could observe that Mr. DeSantis was not


1 armed, whether the officers knew that Mr. DeSantis was bipolar and in mental crisis, whether
2 Mr. DeSantis threatened anyone with a gun, and whether the officers could have used the dog or
3 the Tasers to stop Mr. DeSantis when he started moving towards the officers.

4 Moreover, contrary to Defendants' argument, the Court did not base its findings on a
5 premise that the officers were required to use the least intrusive alternative if deadly force could
6 have justifiably been used. Rather, the Court concluded, considering the evidence in the light
7 most favorable to Plaintiffs, that the use of deadly force could not have justifiably been used.
8 Nor did the Court ignore the testimony of Defendants' experts and the officers as to why
9 alternatives were not feasible. Instead, the Court found that such evidence, when considering
10 all the evidence in the light most favorable to Plaintiffs, did not demonstrate as a matter of law
11 that the officers's only alternative was to shoot DeSantis.

12 Nevertheless, to the extent Defendants appeal is based on an argument that, considering
13 the evidence in the light most favorable to Plaintiffs and resolving all factual disputes in
14 Plaintiffs' favor, Defendants are still entitled to qualified immunity, such appeal would not be
15 frivolous. Therefore, the Court DENIES Plaintiffs' petition to certify the appeal as frivolous.

16 **IT IS SO ORDERED.**

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18 Dated: January 5, 2008



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE